

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	)	Grievant: Ortiz, Jorge
	)	
Between	)	
	)	
UNITED STATES POSTAL SERVICE	)	Post Office: Santa Ana P&DC
(hereinafter "the Employer")	)	
	)	Case No: F06M-1F-C 07300773
and	)	
	)	Union No: IJ212D07
National Postal Mail Handlers Union, AFL-CIO)	)	
(hereinafter "the Union")	)	
	)	
_____	)	

BEFORE: ARBITRATOR: James G. Merrill

APPEARANCES:

For the U.S. Postal Service	E.T. Lewis, Labor Relations Specialist
	Nick Barson, Labor Relations Tech Support
For the Union:	Clyde Abad, Arbitration Advocate
	Benito Araiza, Advocate Assistant
Place of Hearing:	Santa Ana P&DC, 3101 W. Sunflower Ave. Santa Ana
	California
Date of Hearing:	July 16, 2008

AWARD: The separation of the grievant is not grievable and arbitratable as the grievant was separated during his probationary period.

Date of the Award: August 7, 2008

PANEL:

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James G. Merrill, Arbitrator

**Issue**

The issues in dispute are:

1. "Is the dispute as to whether or not the Employer's action separating the employee occurred during his probationary period arbitrable as a precondition to the applicability of Article 12.1.A?"
2. "Does Article 12.1.A deny a probationary employee access to the grievance procedure to challenge his separation on the grounds of alleged non compliance with the procedures in Section 365.32 of the ELM.
3. "Was the grievant separated during his probationary period? If not what is the appropriate remedy?"

**Background**

The grievant was hired in January 2007 as a mail handler. During his probationary period he was terminated. As a result of an EEO settlement, the grievant was rehired on May 26, 2007 with a new probationary period. The probationary period ended on August 23, 2007. The employee received a 30 day, 60 day and 80 day evaluations regarding his performance and attendance. As a result of the 80 day evaluation which was held on August 13, 2007, the Acting MDO Melissa Basco provided the grievant with the evaluation (form 1750), The evaluation cited attendance problems and a recommendation he not be retained as an employee. He signed the form and was escorted off the property after relinquishing his badge and access card. He was told that August 13, was his last day of work. On August 28, 2007, the Union filed a grievance on behalf of the grievant claiming the grievant completed his probationary period and no just cause existed to separate him. The grievance was processed through Step 3 and appealed to Arbitration.

**Summary of Employer's Position**

The Employer's Advocate stated that the grievant's separation from employment was not grievable and not arbitrable since the grievant was separated during his probationary period as set forth in Article 12.1.A and the Joint Contract Administration Manual. Article 12.1.A denies the probationary employees separated during their probationary period access to the grievance procedure.

The Grievant was removed during probation. Specifically, there is no dispute that the Grievant's probationary period would have ended on August 23, 2007, had he completed a full 90 days of employment. There is no dispute that the last day he worked was August 13, 2007. The form 1750 (Exhibit 6) has his initials on the form and reflects the fact that the effective date of his separation was August 13, 2007. During this meeting he was told he was fired. In addition, the grievant filed an EEO complaint on August 14, 2007, (Exhibit 4) alleging he was fired. He never attempted to report for work after that date.

The Acting MDO, Melissa Basco, testified that on August 13, 2007 she met with the grievant and conducted the 80 day evaluation, The evaluation results is reflected in the 1750 form. The grievant signed the completed for and signed it. He was instructed to relinquish his badge and access card which he complied. He was escorted off the premises. She told the grievant that he was being terminated. The grievant was also advised if he had any questions to contact his Union.

The Employer's Advocate stated that the facts support that the employee was separated during his probationary period and his separation is not grievable or arbitrable.

### **Summary of Union's Position**

The Union's Advocate stated that the grievant was never told he was terminated until he received a letter dated August 13, 2007, signed on August 23, 2007 and received by the grievant on August 25, 2007. Official notice of the grievant's termination was not received within the 90 day probationary period. The grievant was on the rolls on August 23, 2007. Furthermore, the Employer violated the provisions of the ELM section 365.32 by not providing written notice of the grievant's separation within the 90 day probationary period.

The grievant testified that during his 80 day probationary meeting, he was not told he was being separated. He was instructed to turn in his badge and was escorted off the premises. When he asked if he was being fired, he was told to talk to his union representative. He testified that he did file an EEO complaint on August 14, 2007 based on advice from his Union Representative, as a precaution to protect his rights in the event that he was being terminated.

The grievant did not receive a letter that he was separated until 2 days after the completion of his probationary period Thus the grievant has a right to grieve the separation based on the just cause provisions of Article 16 of the National Agreement.

The grievant was not separated for just cause and should be reinstated with full back pay and benefits.

### **Discussion**

There is no dispute on the basic facts of this case. The grievant's probationary period was from May 26, 2007 through August 23, 2007. The grievant received 30, 60 and 80 day probationary evaluations regarding his performance and attendance. The Acting MDO, Ms Basco met with the grievant on August 13, 2007, provided him with a completed form 1750 which outlined his performance, recommended that he be terminated effective on that date. The grievant signed the form and was provided a copy. The grievant turned in his badge and access card and was escorted off the property by the MDO and supervisor. He did not work after August 13, 2007. The grievant received a

letter of separation dated August 13, 2007 which was signed by MDO Basco on August 23, 2007. He received that letter On August 25, 2007.

What is in dispute is whether the grievant was separated during his probationary period? Is his separation grievable, based on the Union's argument that section 365.32 of the ELM is grievable as it applies to a probationary employee?

The parties submitted Arbitration Decisions to support their respective positions. The Arbitrator has reviewed each award as they apply to the issues in dispute.

- The parties submitted Arbitrator Das Award Q98C-4Q-C 99251456 dated September 10, 2001. The issue in this case was "whether the Postal Service had effectuated a separation of an employee during his or her probationary period and was that dispute subject to the grievance-arbitration procedure. More particularly, the Unions maintain that Section 365.32 of the EML sets forth four procedural requirement for effectuating the separation of a probationary employee, and that the Union may file a grievance that challenges weather those separation procedures were followed." Arbitrator Das ruled that:

*"1. Article 12.1.A denies a probationary employee access to the grievance procedure to challenge his or her separation on the grounds of alleged non compliance with the procedures in Section 365.32 of the ELM"*

*"2. A dispute as to weather or not the Postal Service's action separating the employee occurred during his or her probationary period is arbitrable because that is a precondition to the applicability of Article 12.1.A."*

The Postal Service submitted two court decisions which are relevant to the issues in this case.

- *The Fourth Circuit Court of Appeals ruled in a case appealed by the Postal Service regarding Arbitrator Miles Award. The case involved an employee who was separated during his probationary period but the provisions of the ELM section 365.32 were not followed. "Arbitrator Miles found that the grievance was arbitrable. He asserted that although Article 12 entitles the Postal Service to terminate probationary employees before the end of heir probationary periods, the Postal Service must effectuate any such termination in accordance with ELM. The district court ruled that "Arbitrator Miles exceed his authority by issuing an award that was directly contrary to the language of the parties' collective bargaining agreement. The court vacated the Award.*

- The United States District Court For the District of Columbia submitted a Final Judgment regarding an Arbitration Award issued by Arbitrator Lawrence R Loeb. The Court's ruling stated *"in that opinion Arbitrator Loeb in essence permitted a challenge to whether the employee was properly terminated within her probationary period pursuant to the provision set forth in the Employee and Labor Relations Manual ("ELM"). In re U.S Postal Serv. Vs Am. Postal Worker Union No. C94C-4C-D 98076813 (2006) Loeb, Arb. "Loeb Award at 17, attaché is Ex. 7 to Ex A of USPS Mem. Because USPS failed to provide written notice to Daliessio during her probationary period Arbitrator Loeb concluded that her termination was ineffective and she became a permanent employee entitled to the grievance procedure. He ordered Daliessio reinstated with back pay and no loss of seniority"*

Judge Richard Leon ruled that *" Arbitrator Loeb, for reasons unclear to the Court, failed to appreciate the rulings by the Fourth Circuit and Arbitrator Das. His decision simply stated, exceeded the authority granted by the National Agreement. Because the Das Award and the Fourth Circuit decision, expressly disallows probationary employees access to grievance procedures for challenges to a separation based on non-compliance with ELM section 365.32, Loeb reliance on those procedures to determine that Daliessio was not terminated within the probationary period is misplaced. In fact, it runs directly counter to Article 12.1A as interpreted the Das Award. This flawed analysis constituted the type of manifest disregard of the National Agreement that requires this Court to vacate the Loeb Award."*

In this particular grievance, this grievance is arbitrable based on the Das Award regarding the dispute if the grievant was separated during his probationary period. The Union is correct that it has the right pursuant to Article 12.1.A to grieve whether an employee is terminated during his or her probationary period. Arbitrator Das' Award is clear on that point.

In addition, based on the Das Award, the Fourth Circuit Decision and the United States District Court of the District of Columbia Decision, the Union's right to grieve and arbitrate the issue that if the Employer did not follow the ELM section 365.32, when it separated the grievant, such a right is not grievable and arbitrable. The Das Award and the court decisions are clear on that point.

The issue remaining to be decided is whether the grievant was separated during his probationary period. The Employer provided the following evidence that the grievant was separated during his probationary period.

1. An 80 evaluation Form 1750 dated August 13, 2007 which sets forth an evaluation recommending that that the grievant not be retained as an employee.. The grievant signed

the form and was provided a copy. Acting MDO Basco is the authorized authority to decide if the grievant be separated.

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2. The MDO Basco testimony that she informed the grievant that he is being separated on August 13, 2007.
3. The MDO and supervisor's taking the grievant's badge, and access card and escorting him off the premises on August 13, 2007.
4. The fact that the grievant did not work after August 13, 2007.
5. The grievant filed an EEO Complaint on August 14, 2007 stating in the complaint that "On August 13 MDO Millissa Basco took me in to her officer and let me go."
6. The August 23, 2007 letter of separation which was the last day of the probationary period

The Union's case is based on the grievant's testimony that he was was not informed that he was being separated on August 13, 2007. There was no additional relevant evidence or testimony from the Union to support their position.

Therefore, a review of the entire record and evidence, the preponderance of evidence supports that the grievant was separated during his probationary period.

#### **Award**

The separation of the grievant is not grievable and arbitratable as the grievant was separated during his probationary period.

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James G. Merrill, Arbitrator

Dated: August 7, 2008